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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 105

CONTINENTAL CASUALTY COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA,
for the use and benefit of
Minneapolis-Honeywell Regulator Company

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Continental Casualty Company, a corporation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case.

OPINION BELOW

The opinion of the Court of Appeals (Appendix E) has not been reported.

JURISDICTION

The decision of the Court of Appeals for the Fourth Circuit was entered on January 11, 1968. Petition for rehearing was duly filed February 9, 1968 and was denied February 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is it not a misapplication or misuse of both Rule 53 and Rule 52 of the Federal Rules of Civil Procedure when the District Court, after a limited reference to a Special Master, accepts the Master's "opinion" respecting a crucial matter not referred to him (involving the construction and application of the Miller Act), rests its conclusion upon such Master's opinion by invoking the clearly erroneous provision of Rule 53, after having admitted material documentary evidence offered by Petitioner, and not before the Master; and when the Appellate Court rests thereon its own conclusion and judgment, simply by invoking the clearly erroneous review provision of Rule 52?

2. Is not a subcontractor's suit on December 4, 1964 too late under the Miller Act (40 USC, 270b.) when the entire prime contract work was finally inspected by the Government in October 1963; the one year guarantee period was established by the Government at October 23, 1963, the 8 remaining "punch list" items listed by the Government were performed and completed by the subcontractor prior to November 24, 1963 and the final billing to the prime contractor for the subcontract work for which the subcontractor's claim was made was sent from its home office on November 27, 1963?

STATUTE AND RULES INVOLVED

Title 40 United States Code, Section 270b. (part of the Miller Act) provides:

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after *the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made,* shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* that any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from *the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made,* stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons."

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after *the day on which the last of the labor was performed or material was supplied by*

him. The United States shall not be liable for the payment of any costs or expenses of any such suit." (emphasis added)

RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 53. Masters (in pertinent part)

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it. (in force September 29, 1965 when reference made)

(e) **Report.**

(I) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall filed the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(II) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

STATEMENT

In this suit brought on December 4, 1964 in the District Court by Minneapolis-Honeywell, use plaintiff subcontractor, against Markowitz Brothers, Inc. (prime contractor with the United States for installation of air conditioning equipment in FOB No. 2, Phases 3 and 4, Arlington, Virginia) and its Miller Act payment bond surety, petitioner, Continental Casualty Company, the District Court referred the case to a Special Master "to take such evidence as he deems necessary in determining the amount due, if any, to the plaintiff on its complaint and the amount due, if any, to the defendant on its counterclaim." (Appendix A, p. 12) The Special Master found that Honeywell had established its claim for the sum of $48,038.65, with interest, and that Markowitz was not entitled to anything on its counterclaim.

In addition, the Special Master in his report stated that he was "of the opinion that 26 December, 1963 was the last day on which labor was performed and materials supplied by the use-plaintiff." (Appendix B, pp. 14-15)

At the hearing on the Special Master's report, the District Court admitted in evidence three exhibits (Appendix C-1, C-2, C-3, pp. 27-29) which were not before the Special Master. Thereafter, in its memorandum opinion (Appendix C, p. 26), the District Court stated:

> "This suit was filed on December 4, 1964. The Master found that December 26, 1963 was the last day on which plaintiff performed work under its contract. Although the evidence on this phase of the case is conflicting, the Master has found December 26th to be the controlling date.
>
> "Review of the record discloses that this finding is not clearly erroneous, hence it is confirmed by the Court."

On appeal, the Circuit Court of Appeals (Appendix E, p. 31) merely said and held:

> "Per Curiam:
>
> "Whether or not this Miller Act suit was timely filed turns entirely upon a question of fact. We think its resolution by the Master, accepted by the District Court, was not clearly erroneous.
>
> *Affirmed.*"

The undisputed facts relative to the timeliness of the suit were as follows: The Honeywell subcontract with Markowitz, dated July 30, 1962, was to furnish and to install a complete and operating automatic temperature control system, including valves and thermostats, where required, for the lump sum of $185,000.00, later increased by two change orders to $186,284.00. On May 20, 1963, when Markowitz made its last payment to Honeywell, the latter had billed for work performed under the subcontract in the sum of $174,536.32 and had been paid the sum of $137,536.32, including the last payment. On August 14 and September

19, 1963, Honeywell submitted further invoices respectively of $10,263 and $1,768 which, added to the previous invoices, amounted to the total adjusted subcontract price less the sum of $50.00. After final inspection in October 1963 by representatives of General Services Administration, a "punch list" was prepared by the Government detailing certain items of work either not performed or performed improperly by Markowitz or by its subcontractors which included 8 items pertaining to Honeywell's work. Honeywell's 8 items were completed prior to November 24, 1963. The contracting officer for the Government informed Markowitz that October 23, 1963 was accepted as the date of substantial completion of the work done under the contract and that the air conditioning systems including heating were operable under new controls and on November 15, 1963 he stated that the guarantee period for all mechanical and electrical equipment would start from October 23, 1963.

Honeywell's steamfitter Hinds worked on November 22, 1963 at the job site for eight hours and on November 27, 1963 Honeywell, from its cost department in Minneapolis, sent its "final billing" to Markowitz including the $50.00 previously unbilled and leaving a balance of $48,747.68 due, reduced by Honeywell at the trial to $48,038.65, the principal amount of the judgment. The last payroll affidavit submitted by Honeywell (pursuant to Article 4c of its subcontract) covered the period ending November 22, 1963. Honeywell in writing under date of December 2, 1963 through its local Service Supervisor informed Markowitz that the temperature controls furnished by it for the job were installed and operating in accordance with the contract plans and specifications. Under date of December 20, 1963 the contracting officer for the Government wrote Markowitz regarding heating units in crosswalks and restrooms in FOB No. 2 stating that unsatisfactory conditions existed in those areas; that the problem had been referred back to the design engineer; and that solution thereof was not part of its contract work.

As the Master stated in his report (Appendix B, p. 14) the steamfitter Hinds did testify before him that on December 26, 1963 he worked at FOB No. 2 finishing calibrating and checking out room thermostats that controlled volume temperatures and P.E. pneumatic electric switches which energize fan coil units and also installed two capillary remote volume thermometers; that such work was not considered guaranteed work and was "under the contract of the job." There was no evidence that either the Government or Markowitz requested Honeywell to do the work Hinds said he did.

REASONS FOR GRANTING THE WRIT

1. The Appellate Court plainly held that the Master resolved the question of timeliness of the suit and that his "resolution" thereof was "accepted" by the District Court. Yet, after the Master had reported to it, the trial court admitted three exhibits in evidence (Appendix C-1, C-2, C-3, pp. 27-29) offered by Markowitz and Continental which were material. It may not be said those exhibits could not and would not affect the result. Nevertheless, instead of making its own findings and conclusions on the whole record, uninfluenced by and without regard to the Master's opinion respecting the timeliness of the suit (not a matter entrusted to the Master in the limited order of reference), the District Court, invoking the clearly erroneous provisions of Rule 53, misapplied the Rule. The Master's opinion necessarily involved the construction of the statute[1] and the application thereof under such construction to the undisputed facts.

The Appellate Court compounded the error by applying the clearly erroneous review provisions of Rule 52 to the procedure and action in the District Court. Thus no one has made original and independent findings and conclusions on the record as a whole and in the light of the Act which petitioner believes results in a lack of due process in the Constitutional sense.

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[1] Treated under 2, *infra*.

2.(a) The Master's standard or test was simply whether work was done by Honeywell and materials were supplied by it on December 26, 1963. The District Court incorrectly attributed to the Master a "finding" that Honeywell did work "under the contract" on December 26, 1963.[2] The correct standard or test applicable to the undisputed facts here derives from the proper construction of Section 270b. of the Miller Act. That section should be considered as a whole, keeping in mind that subsection 270b.(a) was enacted in 1935 and subsection 270b.(b) became law in 1959.

(b) Section 270b.(a) of the Act creating and accruing the right in Honeywell to bring suit on the payment bond pinpoints and illuminates the decisive date as being "the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made * * *." The later enacted Section 270b.(b) must also, by its very language, relate and refer back to the same date or day as is provided in 270b.(a). Thus, the accrual date of the cause of action created by the section and the closing or termination of the right to sue are to be measured from the same point of time. Such is consistent with any limiting time period whether one of mere limitation of action or of condition of right to sue.

Such construction is reinforced by virtue of the use of the word "the" in the language "last of *the* labor was performed or material was supplied by him."[3] Such sentence is without a point of reference, meaning or application unless it relates back to "the day on which the last of the labor was done

---

[2]The "under the contract" conclusionary statement by the steamfitter would apply to guaranty work done by request of the Government at any time prior to October 23, 1964 but that would not, as is well known, extend the time for another year within which to bring suit on the Miller Act payment bond.

[3]Syntax dictates that the word "the" before "labor" also modifies "material."

* * * for which such claim is made." In construing such sentence, one may not excise the aforesaid word "the" in section 270b.(b) nor substitute therefor the word "any."[4]

Here, the day on which Honeywell furnished the last of the labor or material for which its claim was made was at the latest by November 24, 1963, whereas its suit was brought on December 4, 1964.

The problem presented here is a frequently recurring one and important in the construction and application of 270b. (b) to Miller Act payment bond suits. Such has not heretofore been construed by this Court and should be finally to resolve the question in view of the vast number of construction contracts of the United States and of the many suits on the Miller Act payment bonds.

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[4]The Ninth Circuit, without discussion, in *United States v. Western Electric Co.*, 337 F.2d 568, 572, said that suit must be filed within one year from the date of the events described in Section 270b.(a). The Fifth Circuit in *Trinity Universal Insurance Co. v. Girdler*, 379 F.2d 317, and in *General Electric Co. v. Southern Construction Co.*, 383 F.2d 135, cert. den., No. 1023, October Term, 1967, seems not to have considered the significance of the word "the" in Section 270b. (b). It is believed that the peculiar facts and occurrences in *General Electric* may not have been sufficient to raise the question presented to this Court in No. 1023. There was no final Government inspection of the whole contract work, establishment of guarantee period, and final billing by the plaintiff for all of its work—all more than one year prior to the bringing of the suit—as in the instant case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[A true copy, Teste: /s/ Davis R. Casey, Deputy Clerk]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
At Alexandria

UNITED STATES OF AMERICA,
to the Use of MINNEAPOLIS-
HONEYWELL REGULATOR COM-
PANY,

Plaintiff,

v. Civil Action No. 3522

MARKOWITZ BROTHERS, INC.,
et al.,

Defendants.

ORDER

This case is herewith referred to James Woolls, Esquire, Alexandria, Virginia, who is hereby appointed as Special Master of this Court for the purpose of taking such evidence as he deems necessary in determining the amount due, if any, to the plaintiff on its complaint and the amount due, if any, to the defendant on its counterclaim.

The hearing date for the taking of the evidence herein shall be fixed by the Master as soon as is reasonably convenient to the parties in interest, and the Master shall file his report with the Court on or before sixty days from the date of the entry of this order.

The Clerk will furnish the Special Master with copies of all pertinent papers in this case together with a copy of this order, and will mail a copy of this order to all counsel of record.

/s/ Oren R. Lewis
September 29, 1965 United States District Judge

APPENDIX B

[Filed Feb. 2, 1966]

REPORT OF SPECIAL MASTER

TO: THE HONORABLE OREN R. LEWIS,
UNITED STATES DISTRICT JUDGE:

The undersigned, James Woolls, having been named as Special Master herein by Order entered in this cause on 29 September, 1965, respectfully reports as follows:

That, pursuant to the requirements of Rule 53 (d) of the Federal Rules and of said Order of Reference, the undersigned met with counsel for the parties on 1 November, 1965 at which meeting all present selected a time for the presentation of the evidence. Counsel prepared and exchanged statements of their claims in November, 1965, copies of which have been filed herein.

On 11, 12, and 13 January, 1966, the undersigned did proceed to further execute said Order of Reference by proceedings held in the Post Office Building in Alexandria, Virginia. Counsel for the parties were present and examined the witnesses; that attached hereto and asked to be read as a part hereof is exhibit "A", a listing of the exhibits presented by the parties. All proceedings, with the exception of the aforesaid Conference, were stenographically recorded. That by Order of this Court, the time allowed for the filing of this report was extended to 30 January, 1966.

After consideration of the testimony of the witnesses called by the parties, of the exhibits filed herein, and of the pleadings in this cause, the undersigned would respectfully report:

1. *Ability of Defendant to Prove Set-off, Recoupment, or Counterclaim.*

Counsel, in opening statement, indicated that the Court had reserved decision on the issue of whether the defendant, Markowitz Brothers, Inc., could prove a claim to set-

off in these proceedings. No testimony was offered to show such defendant had actual notice of the requirements of Virginia Code Section 54-142, prior to the execution of the contract. Because of the particular nature of this action, the matter appears limited to the question of whether the Court's discretion will permit the assertion of a counterclaim in the Answer and Answer to Interrogatories in the interests of justice. (Cf. Virginia Code Sec. 54-141, *U.S. for the use of Bernadot vs. Golden West Construction Co.* (1961) 194 F. Supp. 371; F.R. Civ. P. 7(a), 8 (a) – (c).)

2. *Time of limitation of action.*

The plaintiff, Minneapolis-Honeywell Regulator Company, has complied with the requirement that it establish this action. It was commenced within one year from the date on which the last of the labor was performed, or material was supplied by it. The statute conferring the action limits liability and plaintiff must show timeliness of filing, even in the absence of special pleas by the defendant.

Mr. Robert Shuman, Mr. Lawrence Hinds, Mr. William Kempton and Mr. R. Kinzer testified concerning the date of completion of the contract, mentioning the notification of completion, the request and payment of labor charges and the request and payment of "progress payments." Pay records indicate that there were no regular employees of use plaintiff at the job site after November, 1963, however, Mr. Lawrence Hinds testified that he worked on the job site in November and on 26 December, 1963, on which dates he performed approximately eight (8) hours work in calibrating, testing and checking the items installed by plaintiff and in installing two thermometers. He identified documents prepared in December, 1963 and stated that his work was "contract" work, rather than "guarantee" work. The work and documents were completed in December, 1963, for purposes other than extending the time for filing of pleadings.

Article 4 (e) of the contract states that final testing of materials supplied is the responsibility of the subcontractor, who is to bear the expense of the same. The undersigned is of the opinion that 26 December, 1963 was the last day on which labor was performed and materials supplied by the use plaintiff.

3. *The amount, if any, due the use plaintiff on its complaint.*

The duties and obligations of the parties are determined by the agreement of 30 July, 1962, as modified by two change orders accepted by all parties hereto (plaintiff's exhibits 10, 11 and 12).

As a result of discussion made during these proceedings, the total claim of the use plaintiff has been reduced from $48,747.68 to $48,038.65, which figure represents the total contract price, less credits allowable to the defendants. The evidence establishes that the use plaintiff undertook to furnish and install a complete and operating automatic temperature control system in the project known as Federal Office Building No. 2, Arlington, Virginia. The use plaintiff's obligation to the contract is more particularly described in the said three exhibits – they are not herein described, except insofar as placed in issue by the parties.

Several witnesses stated that the air conditioning equipment was apparent on the job site and was in apparent conformity to the plans and specifications. The plaintiff has shown it actually completed its work in December, 1963; the defendant, Markowitz Bros., accepted this work as complete in October, 1963.

The plaintiff's substitution of electrical items for "pneumatic" items depicted on the architect's plans is not a breach of contract, preventing recovery by the plaintiff.

Mr. J. McNabb, who participated in the preparation of the architect's plans, stated that the "pneumatic" controls

were used merely for simplicity and that the plans and specifications permitted the substitution of electrical items or electronic items for pneumatic items.

Article 15 of the contract states that drawings are to be considered, together with specifications. The specifications to the particular project (plaintiff's exhibit No. 4) refer to substitutions of items and, further, refer to the standard air conditioning specifications. The standard air conditioning specifications (plaintiff's exhibit No. 3) also allow the substitution of items and state that the one system may be substituted for the other at the option of the contractor and that control diagrams are not intended to indicate a preference for a particular type of system. The prime contractor (Markowitz Bros.) had not indicated a preference for one of the three systems. Mr. John Leander testified that prior to the letting of the contract to the use plaintiff, he advised Markowitz Bros. of the type of system he proposed to use and that it substituted electrical for pneumatic items.

Some of the distinctions between the three options is referred to herein under "Amount, If Any, Due the Defendant on its Counterclaim."

The parties are in agreement that, of the total contract price $186,284.00, the defendant should be given credit for payments and deductions totaling $138,245.32. The defendant has not paid use plaintiff the balance of $48,-038.65, which is the amount due the use plaintiff.

4. *The amount, if any, due the defendant, Markowitz Bros. on its counterclaim.*

Of several items listed by the defendant, Markowitz Bros., prior to the hearings, it has presented evidence only as to the following:

(a) For $9,500.00 as damages caused by delays occasioned by plaintiff resulting in an assessment of $19,000.00, pursuant to the terms of the contract between Markowitz Bros., and the United States (General Services Administration).

(b) For $3,058.02 as expense of relocation of control panels and systems initially installed by use plaintiff.

(c) For liquidated damages of $60,000.00, pursuant to Paragraph 6, Schedule (a) of contract, being $500.00 per day for 120 days.

(d) For $12,880.00, as difference in contract price, due to substitution of "electrical" items for pneumatic items, depicted in architect's plans.

(e) For $6,893.11 as the expense of additional wiring and connections caused by use plaintiff's substitution of "electrical" items for "pneumatic" items.

Total claim is $92,331.23.

A. Evidence concerning the claim for damages in the amount of $9,500.00, consists of statements of one witness that he knew of and the defendant, Markowitz Bros., being assessed $19,000.00, when its contract with the United Sta (General Service Administration) was not completed according to its terms. There is no evidence to indicate the use plaintiff's responsibility for the delay or for any portion of the assessment.

B. Mr. John Lancaster and Mr. Alvin B. Culpepper of Allen & Whalen of Virginia, Inc., stated that their firm moved approximately fifteen control panels installed by use plaintiff and that the expense of such relocation was $3,-058.02. Their testimony further shows that the panels were initially installed according to plans and specifications with slight modifications required by the physical characteristics of the building. An overcrowding of controls required these panels to be relocated and placed in a more "practical" site. The move was ordered by the General Services Administration and the use plaintiff is not responsible for the expense of relocation.

C. Paragraph 6, Schedule (a) of the contract of 30 June, 1962, provides for payment of $500.00 per day in the event

the use plaintiff fails to provide the defendant, Markowitz Bros. Inc. "acceptable" shop drawings and supporting data "as required by the contractor and/or the project specifications." This time limit is longer than that mentioned in Article 14 of the contract.

There is no evidence of actual damages resulting from breach of this contractual provision. Prior to 22 August, 1962, the use plaintiff submitted certain shop drawings and supporting data. Mr. Hill testified that these were examined by the defendant only to determine if they concerned the subject project. They were then forwarded to the architect on 22 August, 1962. In August and September, 1962, the architect and agents of the use plaintiff discussed amendments and corrections to the shop drawings. On or about 23 September, 1962, four of the original shop drawings were prepared. Mr. McNabb testified that the architect was to revised and three additional drawings were prepared. Mr. McNabb testified that the architect was to recommend approval or disapproval, and that final approval was the function of the General Services Administration. He stated that the revisions of September, 1962 concerned minor details only.

On 24 September, 1962, the revised shop drawings were sent to Markowitz Bros. to the architect. On 29 November, 1962, the architect forwarded the shop drawings and supporting data, with "eleven advisory comments" to the General Services Administration who finally approved the plans and comments during the first two months of 1963.

Shop drawings are required to implement the architect's plans and to assist him, and other contractors in the estimation and coordination of the work to be performed. The drawings prepared in August of 1962 were sufficient for this.

Article 14 of the contract, Section 1-22 of its general conditions, and Section 2-10 of its Special conditions, outlines

the procedure for the submission of shop drawings and supporting data. Revision of minor details and resubmission is contemplated and the parties in this case did not expect immediate approval by the General Services Administration.

The defendant, Markowitz Bros. desired plans "acceptable" to it and for the above purposes. It did "accept" and approve the plans in August, 1962. Although the plans were not approved by the General Services Administration until the following year, the use plaintiff has complied with Paragraph 6, Schedule A of the contract.

The remaining two claims of the defendant concern the option to substitute electrical control systems (fire stat's, freeze stat's, etc.) for pneumatic control systems in 322 instances. The difference between the two systems has been partially explained by the evidence. It appears that a "pneumatic" electrical control system contains a device which, by air pressure impulse, operates an electro-pneumatic relay, which in turn starts and stops other electrical devices. It is "essentially" pneumatic, and does require some electrical wiring. Those elements which are "pneumatic" were connected by pipes, rather than wires. Installation of the piping is a field of a steam fitter, rather than an electrician. Some electrical wiring is also required. The use plaintiff, Minneapolis-Honeywell, was required to furnish the piping to "pneumatic" items installed. Where an electrical or a pneumatic-electric system is substituted for a pneumatic system, additional electric controls are sometimes called for. Both systems are found in congested "equipment" rooms of the building.

Mr. Leander stated that prior to the execution of the contract, he advised Markowitz Bros. Inc. that a combination pneumatic-electrical system would be installed. Prior to the execution of the contract, he conferred with agents of the defendant to clarify the matters, to permit defendant to negotiate with the electrical contractor (Tr. pp. 62, 63). He stated that prior to the execution of the contract, he pre-

pared a listing of equipment that required wiring and mounting of electrical devices. In negotiations, use plaintiff did not advise the defendant of disparaties between the written specifications and the architect's plans. They did furnish submittal data and listings of equipment to the defendant, Markowitz Bros. Inc. They did specifically mention one option regarding multiplex and non-multiplex items (Tr. p. 81).

D. The claim for $12,880.00 is founded upon Mr. Kinser's estimate of a unit cost of $40.00 to install units. He stated that, of the 322 units mentioned in the letter of Allen & Whalen Company, (defendant's exhibit 2), the cost per unit to install electrical units would be $20.00 (Tr. p. 163 et seq.). It is not certain from his testimony whether the cost of installation of pneumatic units is $20.00 or $40.00 greater than that for electrical units. Allen & Whalen Company has claimed approximately $20.00 per unit for wiring electrical units. The claim is presented in addition to that for actual expense of wiring the units. The defendant contends that it would not have accepted use plaintiff's bid for the contract price of $485,000.00, had it been advised of the substitution. It contends that it, rather than the use plaintiff, should profit by a savings of $12,880.00, resultant from the substitution of 322 electrical units for 322 pneumatic units. There is no evidence to show that during the construction of Federal Office Building No. 2, the matter was asserted to justify a deduction from the contract price. The claim is not described in any of the documents prepared prior to the hearing. The evidence shows that five firms presented bids for the subcontract, and that the letter of intent (plaintiff's exhibit 9), was received by the plaintiff prior to the time it received documents necessary to prepare its shop drawings. The difference in the cost of installation of 322 units was relatively minor, and in an area not covered by contract negotiations. Prior to the execution of the contract, the use plaintiff had no duty

to mention the substitution. The contract drafted by the defendant would required use plaintiff to bear the cost of its substitution of more expensive items (Cf. Art. 15 of Contract, U. S. for use of Westinghouse Electrical Supply Company vs. Ahearn, 231 Fed. 2d, 353).

The undersigned is of the opinion that the substitution of the 322 units was permitted by the contract documents and and that the use plaintiff is not obligated to share with the defendant, any profit or saving resultant from the substitution of units.

E. The defendant's claim for $6,893.11 is for additional electrical wiring, occasioned by the selection of electrical control units, rather than pneumatic control units. The contract of 30 July, 1962 states that the "use plaintiff is not obligated to furnish electrical wiring to units installed by it." The firm of Allen & Whalen Companys was the subcontractor to wire the controls after their installation. Its agent stated that their contract was "let in a hurry and in a rush" in the summer of 1962. Their estimate was based upon the architect's plans and they did not see use plaintiff's shop drawings until "late winter or early fall" of the following year. The 322 items are shown as pneumatic items on the architect's plans. In the summer of 1963, the additional work and expense occasioned by the additional electrical wiring, was the subject of discussion between the defendant, use plaintiff and Allen & Whalen Companys. The additional work was later actually peformed by Allen & Whalen Companys and its charge of $6,893.11 is reasonable for such work. Article 15(b) of the contract states that "in case of any discrepancy in the figures, drawings or specifications, the matter shall be immediately submitted to the contractor, whose decision of such discrepancy shall not be adjusted by the subcontractor, save only at his own risk and expense." While the use plaintiff and the defendant did confer, prior to the execution of the contract and did then discuss the particulars of the work to enable

the defendant to negotiate with the electrical contractor, it does not appear that use plaintiff made specific mention of the extent of its substitution of electrical for pneumatic items.

Allen & Whalen Companys, as a firm, has not been made a party to this cause and it has not been established that either of the defendants has paid its charge of $6,893.11.

Interest and Costs

The use plaintiff has requested that it be allowed interest on its claim to commence the date of the completion of the contract, 26 December, 1963. Article 4(f) of the contract would fix a date for interest 45 days later than the 26th of December, 1963 and is controlling on this point.

Costs incurred by reasons of hearings held by the undersigned would include compensation due the Special Master and compensation due court reporters, G. T. Cunningham (12 days) and Deo Wilson (1 day).

SUMMARY

The undersigned is of the opinion that the use plaintiff, Minneapolis-Honeywell Regulator Company has established its claim for $48,038.65, with interest from 10 February, 1964, and that this amount is due to it from the defendant, Markowitz Bros., Inc. and the Continental Casualty Company, surety of such defendant.

The defendant, Markowitz Bros., Inc., has shown that the use plaintiff failed to advise it of discrepancies between the drawings and specifications of the contract, but has not shown that it has been damaged as a result of such failure.

Respectfully submitted,

James Woolls – Special Master

"EXHIBIT A"

Plaintiff's Exhibits:

1. Set of drawings, F.O.B. No. 2, Phase 4 (74)
2. Set of drawings, F.O.B. No. 2, Phase 3 (62 + 27)
3. Standard Air Conditioning, Specifications, August, 1961.
4. Project Specification & Invitation for bids – 5/16/62.
5. Amendments 1 to 4 of contract, dated 6/1/61, 6/4/62, 6/5/62 and 6/7/62.
6. Folder, Shop drawings 61-118C.
7. Folder, Shop drawings (G.S.A.)
8. Proposal, Minneapolis-Honeywell to Wm. H. Singleton Co. (2 p.p.).
9. Letter, Hurst to Minneapolis-Honeywell, dated 7/30/62.
10. Contract, June 1962 (w/o Change Orders)
11. Change Order No. 1
12. Change Order No. 2
13. Work Report of L. Hinds
14. – A Construction Contract 28 June, 1962.
14. – B Bond

Defendant's Exhibits:

1. (For Identification) Contract, June, 1962 (same as Plaintiff's No. 10).
2. Letter of Allen & Whalen dated 8/8/63 (first two pages).
3. Proposal – Minneapolis-Honeywell to Markowitz Bros. dated 10 July, 1962 (2 p.p.)
4. Letter, H. L. Hill to Minneapolis-Honeywell 6/20/63.
5. Letter – Minneapolis-Honeywell to Markowitz Bros. 6/21/63.
6. Letter H. L. Hill to Minneapolis-Honeywell, 5 August, 1963.
7. Payroll record and transmittal letter of 12/12/63.

8. Letter, J. A. Leander to Markowitz Bros. 1 April, 1964.
9. Letter, A. W. Griggs to Markowitz Bros. 2 Dec. 1963.
10. – A – Invoice, Minneapolis-Honeywell, 033707-140.
10. – B – Invoice, Minneapolis-Honeywell, 42829-140.
11. Work Orders, Allen & Whalen, Nos. 751 thru 757.

APPENDIX C

[Filed Mar. 28, 1967]

ORDER AND MEMORANDUM OPINION

The Master concluded that the use plaintiff, Minneapolis-Honeywell Regulator Company, has established its claim for $48,038.65 with interest from February 10, 1964, and that this amount is due to it from the defendant, Markowitz Brothers, Inc., and the Continental Casualty Company, its surety.

Upon reviewing the record in this case, the Court is of the opinion that the Master's report ought to be confirmed, and

It Is So Ordered.

Markowitz Brothers, Inc. excepted only to that portion of the Master's report disallowing its counterclaim en toto and in finding that December 26, 1963 was the last day on which the plaintiff performed work under its subcontract.

The contract between the parties (§ 6, Schedule A) provided that the plaintiff would have to pay Markowitz Brothers liquidated damages of $500.00 a day in the event that the "Subcontractor fails to furnish to the Contractor, within sixty (60) days of the date hereof, acceptable shop drawings . . . and supporting data, as required by the Contractor and/or the project specifications."

The record clearly shows that the shop drawings were first submitted August 22, 1963. (These drawings were not acceptable.) Shop drawings were resubmitted on September 24, 1962, within the sixty-day period. Between these

two dates the architect and the plaintiff discussed the original shop drawings and as a result the resubmitted shop drawings contained four revised and three additional drawings. The resubmitted shop drawings were transmitted via the architect to G.S.A. G.S.A. approved these drawings in late January or early February of 1963.

The defendant takes the position that the plaintiff's shop drawings had to be accepted within the sixty-day period. We do not so read the contract. All the plaintiff had to do was to file acceptable shop drawings within this period of time. That it did.

Markowitz Brothers next complains that the plaintiff saved approximately $13,000.00 by installing a pneumatic-electric temperature control system in lieu of a pneumatic temperature control system. The defendant further contends that this substitution on the part of the plaintiff required it to spend some $7,000.00 additional for necessary electrical wiring. It claims first a reduction in the subcontract price of the amount saved ($13,000.00) or, in the alternative, reimbursement of the $7,000.00 additional electrical expenses incurred.

Both contentions are without merit. The record clearly shows that the bid plans provided for either an electric, pneumatic, or pneumatic-electric temperature control system. The shop drawings submitted by the plaintiff provided for a pneumatic-electric system. The record further discloses that the plaintiff informed a representative of the defendant, both prior and subsequent to the signing of the subcontract, that Minneapolis-Honeywell intended to install a pneumatic-electric system.

The additional electrical work was not a part of the Minneapolis-Honeywell subcontract. The fact that the additional 322 electrical outlets were not included in the Allen & Whalen, Inc. electrical subcontract does not make the charge therefor payable by Minneapolis-Honeywell.

Subsequent to the hearing before the Master and the filing of his report, the defendant moved for leave to submit additional exhibits A, B and C. These exhibits were admitted by the Court over the plaintiff's objections and were considered by the Court in reviewing the record in this case.

The defendant contends that Minneapolis-Honeywell completed work under its subcontract on October 23, or, by the very latest, December 2, 1963. This suit was filed on December 4, 1964. The Master found that December 26, 1963 was the last day on which the plaintiff performed work under its contract. Although the evidence on this phase of the case is conflicting, the Master has found December 26th, to be the controlling date.

Review of the record discloses that this finding is not clearly erroneous, hence it is confirmed by the Court.

Counsel for the plaintiff should prepare an appropriate judgment in accordance with this order and memorandum opinion, submit it to counsel for the defendants for approval as to form, and then submit it to the Court for entry.

United States District Judge

APPENDIX C-1

DEFENDANT'S EXHIBIT A

GENERAL SERVICES ADMINISTRATION
Region 3
Washington 25, D. C.

Nov. 12, 1963

Markowitz Bros., Inc.
4808 Auburn Avenue
Washington, D. C. 20014

Gentlemen:

Reference is made to your letter dated October 23, 1963, your number 405, regarding heating in FOB No. 2.

October 23, 1963, is accepted as the date of substantial completion for work done under this contract. Airconditioning systems, including heating, are operable under new controls.

Sincerely yours,

/s/
Chief, Repair and Improvement, Construction Branch

APPENDIX C-2

DEFENDANT'S EXHIBIT B

GENERAL SERVICES ADMINISTRATION

Region 3
Washington 25, D. C.

Markowitz Brothers, Inc.
4808 Auburn Avenue
Washington, D. C. 20014

Gentlemen:

Reference is made to your letter dated October 31, 1963, your number 408, regarding three requests relating to completion of the contract.

1. The guarantee period for all mechanical and electrical equipment will start from October 23, 1963, the date of substantial completion for this contract.
2. Recommendations have been made to the contracting officer to reduce the retained percentage of the contract to 2% of the original contract amount.
3. Time extensions will be considered only after all claims are evaluated. Time extensions listed in your summary are not acceptable because some of the work on change orders was done concurrently with contract work and because delays for material submitted were mainly due to incomplete or unacceptable submittals.

Sincerely yours,

/s/

Chief, Repair and Improvement
Construction Branch

APPENDIX C-3

DEFENDANT'S EXHIBIT C

GENERAL SERVICES ADMINISTRATION
Region 3
Washington 25, D. C.

Markowitz Bros., Inc.
4808 Auburn Avenue
Washington, D. C. 20014

Gentlemen:

Reference is made to your letter dated December 10, 1963, regarding operation of heating units in crosswalks and rest rooms in F.O.B. No. 2.

It is understood that unsatisfactory conditions exist in these areas. This problem has been referred back to the design engineers. Solution of the problem is not part of your contract work.

Thank you for bringing this matter to our attention.

Sincerely yours,

/s/

Chief, Repair and Improvement
Construction Branch

APPENDIX D

[Filed Mar. 28, 1967]

ORDER

Upon consideration of the record of proceedings before the Special Master, the Special Master's Report, Exceptions thereto and arguments of counsel for all parties to this cause and this Court having issued its Memorandum Opinion, it is, in accordance with said Opinion,

ORDERED AND ADJUDGED, that the use-plaintiff, Minneapolis-Honeywell Regulator Company, have judgment against the defendants, Markowitz Brothers, Inc. and Continental Casualty Company, in the amount of Forty-eight Thousand Thirty-eight and 65/100 Dollars [$48,038.65], together with interest thereon at the rate of six percentum [6%] per annum from February 10, 1964, until paid, together with costs of bringing this action.

Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,498.

[Caption Omitted]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA. OREN R. LEWIS, DISTRICT JUDGE.

(Argued December 8, 1967. Decided January 11, 1968.)

Before HAYNSWORTH, Chief Judge, and CRAVEN and BUTZNER, Circuit Judges.

Kahl K. Spriggs (John F. Myers and Mark P. Friedlander on brief) for Appellants, and Ernest L. Ruffner (James R. Treese, and Jackson, Gray & Laskey on brief) for Appellee.

PER CURIAM:

Whether or not this Miller Act suit was timely filed turns entirely upon a question of fact. We think its resolution by the Master, accepted by the District Court, was not clearly erroneous.

Affirmed.

APPENDIX F

In the

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 11,498

[Caption Omitted]

APPELLANTS' PETITION FOR REHEARING

Appellants, Markowitz Brothers, Inc. and Continental Casualty Company, hereby petition the Court for a rehearing of its *per curiam* decision and judgment in the above-entitled cause, or alternatively for a rehearing by the Court *en banc*, upon the following grounds:

1. (a) Contrary to the implication of this Court's opinion, the Master neither had the authority under the restricted order of reference (JA 5a) to decide the question of the timeliness of the suit below, nor could the District Court, properly or legally "accept" the Master's "resolution" thereof because the District Court itself received material and crucial documentary evidence not before the Master (Defendants' Exhibits A, B and C, JA 57a-59a). As no

one may say what the Master's "opinion" would have been had such evidence been before him (even if he had been authorized to decide the matter), and as equally no one may say that such evidence could not or would not affect the result, the clearly erroneous rule, Rule 53 FRCP, was not applicable in the District Court.

(b) The District Court, after receiving and considering the documentary evidence admitted by it, erroneously rested its determination on the Master's opinion instead of making its own finding of fact and conclusions of law on the matter of timeliness. Rule 52, therefore, does not come into play in view of the record in this case, aside from the necessity of construing and applying the provisions of the Miller Act to the *undisputed evidence* below.

2. (a) Whether the suit below was timely on the state of this record does not turn "entirely upon a question of fact" or upon any dispute concerning a question of fact. To the contrary, the facts respecting the timeliness of the suit are undisputed. The statement of facts made by appellants in their brief (pages 3 to 9) was said by Honeywell (page 2 of its brief) to be "correct and include essentially all those matters pertinent to the points raised on this appeal." The conclusions to be drawn therefrom present legal questions turning upon the proper construction of the provisions of the Miller Act.

(b) The legal standard and test used by the Master and upon which his opinion was founded (JA 7a) was "that 26, December, 1963 was the last day on which labor was performed and materials supplied by the use plaintiff." The District Court in saying (JA 18a) "The Master found that December 26, 1963 was the last day on which plaintiff performed work *under its contract*," and in accepting the Master's opinion also applied an erroneous legal standard and test both under the Miller Act and under Rule 53. This Court in accepting the District Court's action as not being clearly erroneous has transcended Rule 53 and has not met or dealt with the important legal question involv-

ing the construction of the Miller Act and its application upon such construction, to the undisputed facts.

* * *

Respectfully submitted,

MARK P. FRIEDLANDER
1210 Shoreham Building
806 Fifteenth Street, N.W.
Washington, D. C. 20005

Attorney for Appellant
Markowitz Brothers, Inc.

KAHL K. SPRIGGS
504 Southern Building
Washington, D. C. 20005

Attorney for Appellant
Continental Casualty Company

We hereby certify that the foregoing petition for rehearing is filed in good faith and not for delay.

MARK P. FRIEDLANDER

KAHL K. SPRIGGS

[Filed Feb. 23, 1968]

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Caption Omitted]

[ORDER ON PETITION FOR REHEARING]

The Court having heretofore on January 11, 1968 entered its judgment and filed an opinion in the above entitled case and a petition for rehearing having been filed on February 9, 1968,

Now, therefore, upon consideration of the petition for rehearing, and with the concurrence of the entire Court,

It is ordered that the petition for rehearing be, and the same hereby is, denied.

CLEMENT F. HAYNSWORTH, JR.
Chief, Judge, Fourth Circuit

J. BRAXTON CRAVEN, JR.
United States Circuit Judge

JOHN D. BUTZNER, JR.
United States Circuit Judge

[A true copy, Teste: /s/ Margaret L. Davis, Chief Deputy Clerk]